IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

QC ENERGY RESOURCES, LLC,	:	DOCKET NO. 15-01,480
Plaintiff,	:	CIVIL ACTION
vs.	:	
TORUS SPECIALTY INSURANCE COMPANY, ET. AL.	:	
Defendants	:	SUMMARY JUDGMENT

OPINION AND ORDER

Before the Court is a motion for summary judgment filed by Defendant ECM Energy Service, Inc., t/d/b/a/ ECM and Energy Construction Management, LLC, ("ECM") and a cross motion for summary judgment filed by QC Energy Resources, LLC, ("QC"). Upon review of the motions, briefs, the summary judgment record of evidence, and argument, summary judgment is granted in favor of ECM and against QC as to Counts 4. The Court defers ruling as to Count 3 pending argument on the cross-motions for summary judgment as to the insurance coverage referenced in Count 3 which is scheduled for March 30, 2016. The Court provides the following in support of its decision.

FACTUAL BACKGROUND.

This matter arises from the plight of Richard Shearer, an employee of ECM, who sustained significant injuries on September 10, 2011 during the course of his employment. ECM employed Shearer as a water truck driver. At the time of his injuries, Shearer was delivering water to impoundment 289. QC was allegedly solely responsible for the water hauling and discharge activities at impoundment 289. Shearer was allegedly injured due to the negligence of QC. On August 13, 2013, Shearer filed a lawsuit against QC and other defendants related to his injuries. The instant litigation concerns whether ECM is contractually obligated to QC for any liability that may be imposed on QC for Shearer's injuries.

On June 18, 2011, QC and ECM entered a sub-hauler agreement in which ECM agreed to provide transportation services to QC. On September 2, 2014, QC filed a declaratory judgment

action asserting that the sub-hauler agreement required ECM to defend and conditionally indemnify QC from Shearer's claims against QC pursuant to section 8 of the sub-hauler agreement. QC also asserted that it was entitled to common law indemnity and contribution from ECM for any judgment QC paid for Shearer's claims. On March 30, 2015, the Court entered summary judgment against QC and in favor of ECM. No appeal followed.

On June 18, 2015, QC filed the instant litigation contending that section 9 of the sub-hauler agreement required ECM to provide insurance and subrogation that would protect QC from liability exposure from the Shearer lawsuit. In counts 1 and 2 of the complaint, QC seeks a declaratory judgment against Torus Specialty Insurance Company ("Torus") as the provider of insurance for ECM pursuant to section 9 of the sub-hauler agreement. QC contends that section 9 of the sub-hauler agreement requires its insurer, Torus, to defend and indemnify QC. In Count 3 of the complaint, QC avers that ECM breached section 9 of the sub-hauler agreement which purportedly requires ECM to provide specific types of insurance coverage and to name QC as an additional insured. QC seeks damages in the amount of the costs of defense and ***indemnity*** up to the policy limits under insurance policies ECM has with Torus. *See*, Complaint, ¶ 37. In Count 4, QC seeks a declaration that ECM waived its right to subrogation and its worker's compensation lien Section 9(f)(ii) of the sub-hauler agreement. *See*, the "wherefore" clause to Count 4 of the Complaint. In the alternative, QC seeks a declaration that QC is entitled to a judgment against ECM in the amount of the workers' compensation lien. ECM seeks dismissal of counts 3 and 4 on the grounds that the instant litigation against ECM is barred by the doctrine of res judicata or claim preclusion and/or collateral estoppel or issue preclusion.

SUMMARY JUDGMENT

Pursuant to Pa. R.C.P. 1035.2, the Court may grant summary judgment at the close of the relevant proceedings if there is no genuine issue of material fact or if an adverse party has failed

to produce evidence of facts essential to the cause of action or defense. Keystone Freight Corp. v. Stricker, 31 A.3d 967, 971 (Pa. Super. Ct. 2011). A non-moving party to a summary judgment motion cannot rely on its pleadings and answers alone. Pa. R.C.P. 1035.2; 31 A.3d at 971. When deciding a motion for summary judgment, the Court must view the record in the light most favorable to the non-moving party, with all doubts as to whether a genuine issue of material fact exists being decided in favor of the non-moving party. 31 A.3d at 971. If a non-moving party fails to produce sufficient evidence on an issue on which the party bears the burden of proof, the moving party is entitled to summary judgment as a matter of law. Keystone, 31 A.3d at 971 (citing Young v. Pa. Dep't of Transp., 744 A.2d 1276, 1277 (Pa. 2000)).

RES JUDICATA

The Pennsylvania Supreme Court has defined res judicata or claim preclusion as follows.

> Res judicata, or claim preclusion, is a doctrine by which a former adjudication bars a later action on all or part of the claim which was the subject of the first action. Any final, valid judgment on the merits by a court of competent jurisdiction precludes any future suit between the parties or their privies on the same cause of action. Allen v. McCurry, 449 U.S. 90, 94, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980). Res judicata applies not only to claims actually litigated, but also to claims which could have been litigated during the first proceeding if they were part of the same cause of action. Id. Balent v. City of Wilkes-Barre, 542 Pa. 555, 669 A.2d 309, 313 (Pa. 1995).

ISSUE PRECLUSION

The Pennsylvania Supreme court has defined collateral estoppel, or issue preclusion, as follows.

> Collateral estoppel, or issue preclusion, is a doctrine which prevents re-litigation of an issue in a later action, despite the fact that it is based on a cause of action different from the one previously litigated. Id. The identical issue must have been necessary to final judgment on the merits, and the party against whom the plea is asserted must have been a party, or in privity with a party, to the prior action and must have had a full and fair opportunity to litigate the issue in question. *Id.* at 94-95. Balent, supra, 669 A.2d at 313.

WORKERS' COMPENSATION ACT

§ 481 of the Workers' Compensation Act, provides exclusivity as follows.

> (a) The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employes, his legal representative, husband or wife, parents, dependents, next of kin or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death as defined in section 301(c)(1) and (2) or occupational disease as defined in section 108.
>
> (b) In the event injury or death to an employe is caused by a third party, then such employe, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to receive damages by reason thereof, may bring their action at law against such third party, but the employer, his insurance carrier, their servants and agents, employes, representatives acting on their behalf or at their request shall not be liable to a third party for damages, contribution, or indemnity in any action at law, or otherwise, unless liability for such damages, contributions or indemnity shall be expressly provided for in a written contract entered into by the party alleged to be liable prior to the date of the occurrence which gave rise to the action. 77 P.S. § 481.

§ 671 of the Workers' Compensation Act provides for subrogation as follows.

> Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employe, his personal representative, his estate or his dependents, against such third party to the extent of the compensation payable under this article by the employer; reasonable attorney's fees and other proper disbursements incurred in obtaining a recovery or in effecting a compromise settlement shall be prorated between the employer and employe, his personal representative, his estate or his dependents. The employer shall pay that proportion of the attorney's fees and other proper disbursements that the amount of compensation paid or payable at the time of recovery or settlement bears to the total recovery or settlement. Any recovery against such third person in excess of the compensation theretofore paid by the employer shall be paid forthwith to the employe, his personal representative, his estate or his dependents, and shall be treated as an advance payment by the employer on account of any future instalments of compensation.
>
> Where an employe has received payments for the disability or medical expense resulting from an injury in the course of his employment paid by the employer or an insurance company on the basis that the injury and disability were not compensable under this act in the event of an agreement or award for that injury the employer or insurance company who made the payments shall be subrogated out of the agreement or award to the amount so paid, if the right to subrogation is agreed to by the parties or is established at the time of hearing before the referee or the board. 77 P.S. § 671

DISCUSSION

This Court has already determined that the sub-hauler agreement at issue in this case did not provide sufficient specificity to waive ECM's immunity under the Worker's Compensation

Act. *See*, Quality Carriers, Inc. et. al. v. ECM Energy Services, Inc., et. al, No. 14-02,241 (Lyco. Co., March 30, 2015) (Anderson, J.)[1] In that decision, the Court concluded that ECM did not have a duty to defend or an obligation to indemnify QC in the Shearer lawsuit. The Court concluded that the sub-hauler agreement did not effectuate an indemnity of QC by ECM for injuries to ECM's employee injured on the job due to the negligence of QC. That decision was not appealed.

Res judicata bars the instant litigation against ECM. Res judicata requires "four conditions: (1) identity of issues; (2) identity of causes of action; (3) identity of persons and parties to the action; and (4) identity of the quality or capacity of the parties suing or sued." Mintz v. Carlton House Partners, Ltd., 407 Pa. Super. 464, 595 A.2d 1240, 1246 (Pa. Super. 1991). In the present case, as with the first case, the issue and cause of actions is a purported contractual waiver of ECM's immunity under the Workers' Compensation Act in the same sub-hauler agreement. In the first action, QC sought a declaration as to ECM's duty to defend and indemnify QC for its negligence injuring ECM's employee. In the instant matter, QC seeks ECM's insurance provider to defend and indemnify QC up to the policy limits and seeks a declaration that ECM waived its right to subrogation and its worker's compensation lien. The parties are the same in the first action as they are for the counts at issue in the instant matter. The requirements of res judicata are met. While it is true that the March 30, 2015 decision specifically analyzed section 8 of the sub-hauler agreement and not section 9, and the issue of immunity and indemnity was determined and cannot be re-litigated. The Court necessarily

[1] In the March 30, 2015 Order and Opinion, the Court stated that "the language used in the indemnification clause does not expressly state that ECM agrees to be liable for injury to its own employees caused by the negligence of QC." The same is true with respect to subrogation. The sub-hauler agreement does not expressly state that ECM agrees to provide insurance that waives ECM's subrogation for injury to its own employees caused by the negligence of QC.

considered section 8 of the sub-hauler agreement in the context of the entire sub-hauler agreement when it determined that immunity was not waived.[2]

Even if Count 4 was not barred by res judicata, it is barred by collateral estoppel. Collateral estoppel only requires that (1) "that the issue or issues of fact determined in a prior action be the same as those appearing in a subsequent action," and (2) that the party is the same. Thompson v. Karastan Rug Mills, 228 Pa. Super. 260, 323 A.2d 341 (Pa. Super. 1974). In the present case, the issue previously determined by the Court was that the sub-hauler did not provide sufficient specificity to waive ECM's immunity under the § 481 of the Workers' Compensation Act. That issue controls the outcome of the instant litigation. A waiver of subrogation requires a waiver of immunity under § 481 Workers' Compensation Act.

Even if QC was not barred from re-litigating the issue of immunity, indemnity, and subrogation, this Court concludes the sub-hauler agreement, which was not specific enough to waive ECM's immunity under the Worker's Compensation Act, was by extension not specific enough to waive ECM's automatic subrogation under the Worker's Compensation Act which arises from that immunity. Subrogation pursuant to § 671 of the Workers' Compensation Act is automatic and absolute. Thompson v. Workers' Comp. Appeal Bd. (USF&G Co.), 566 Pa. 420; 781 A.2d 1146, 1151 (Pa. 2001); Fortwangler v. Workers' Comp. Appeal Bd. (Quest Diagnostics), 113 A.3d 28 (Pa. Cmwlth. 2015)(citations omitted). The statute is "written in mandatory terms" and confers more than "a "right" of subrogation upon the employer; rather, subrogation is automatic." Thompson, supra, 781 A.2d at 1151. The Pennsylvania Supreme

[2] Taylor v. Woods Rehav. Serv., 846 A.2d 742 (Pa. Super, 2004) is inapposite. In Taylor, an employee was not barred from claims for injuries suffered four years after the work related injuries by malpractice, breach of contract, and intentional distress in his treatment. In the present case, a third-party claims an employer's liability to that third-party (purportedly by contract) for that third-party's potential liability for work related injuries suffered by the employee. It is further noted that Plaintiff's citation to Penn Ave. Place Assocs., L.P. v. Century Steel Erectors, 2002 PA Super 133, 798 A.2d 256 (Pa. Super. 2002) is not persuasive. Penn Ave. Place Assocs did not involve subrogation under the Workers' Compensation Act.

Court's language in Thompson links subrogation with immunity and indemnity as integral parts of the Workers' Compensation Act. Specifically, our Pennsylvania Supreme Court explained the legislative balance struck under the Workers' Compensation Act as follows.

> The Workers' Compensation Act balances competing interests. The Act obliges subscribing employers to provide compensation to injured employees, regardless of fault, either through insurance or self-insurance. See 77 P.S. § 501. In exchange, employers are vested with two important rights: the exclusivity of the remedy of worker's compensation and the concomitant immunity from suit by an injured employee, see 77 P.S. § 481; and the absolute right of subrogation respecting recovery from third-party tortfeasors who bear responsibility for the employee's compensable injuries. See Curtis, 348 F. Supp. at 1064 ("One of the inducements for taking part in the Pennsylvania Workmen's Compensation plan is provided by the grant of subrogation rights"). This leads to the conclusion that **an employer who complies with its responsibilities under the Workers' Compensation Act should not be deprived of one of the corresponding statutory benefits** based upon a court's ad hoc evaluation of other perceived "equities." Thompson, supra, 781 A.2d at 1151 (emphasis added)

A compromise and release of liability existing under the Workers' Compensation Act requires that "the person with the claim specifically agrees to relieve the liable person from that liability." Fortwangler, supra, 113 A.3d at 34. Just as the language in the sub-hauler agreement was insufficient to waive immunity under the Workers' Compensation Act, so too was it insufficient to waive subrogation.[3]

Accordingly, the Court enters the following order.

[3] The lack of an unequivocal and express waiver of subrogation is further evidenced by a Section 9(f) which contains a parenthetical which excepts Workers' Compensation.

ORDER

AND NOW this **23rd** day of **February, 2016**, upon consideration of the motion for summary judgment filed by Defendant ECM Energy Service, Inc., t/d/b/a/ ECM and Energy Construction Management, LLC, ("ECM") the motion is GRANTED as to Count 4. Accordingly, Count 4 is DISMISSED. The Court defers ruling as to Count 3 until argument and full briefing is completed on the pending cross-motions for summary judgment as to the insurance coverage.

BY THE COURT,

February 23, 2016
Date

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Richard A. Gray, J.

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